

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: November 10, 2004

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: 99 Cents Only Store
Cases 21-CA-36133 and 21-CA-36185

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These cases were resubmitted for advice as to whether the Union had a right of access to the Employer's exterior premises under California trespass law, the California State Constitution¹ and/or the Moscone Act,² such that the Employer's threats to arrest Union handbillers were unlawful. We conclude that complaint should issue, absent settlement, alleging that the Employer violated § 8(a)(1) by threatening the handbillers. Although the Employer owned or controlled each of the three locations where handbilling occurred and none was a Pruneyard public forum as to which the Union had a right of access, under current Board law applying California's Moscone Act, the Employer's property interests were insufficient to exclude the Union's peaceful activity. [*FOIA Exemption 5, Casehandling* ³

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FACTS

The Employer operates a large chain of discount variety stores. Its stores are located primarily in California, including stores in Rialto, La Puente and Long Beach.

The Rialto store is located in an approximately 26,000 square foot, free-standing building located on a 2.4 acre parcel of improved land. The building, land and all other improvements are wholly owned by the Employer. The Employer's building shares an approximately 12-acre site with several other businesses. It is surrounded on three

¹ Robins v. Pruneyard, 153 Cal.Rptr. 854 (1979).

² Cal.Civ.Proc. Code § 527.3.

³ [*Foia Exemption 5, Casehandling*]

sides by about an acre of parking that appears to be separated from the other firms' parking areas by sidewalks and distinctive landscaping. The Employer also leases about 6,000 square feet of the building to an unrelated discount clothing store.

The La Puente store is located in an almost 3-acre Employer-owned strip-type shopping center. In addition to the Employer's store, there are about seventeen, mostly smaller, businesses in the shopping center. There is also a free-standing fast-food restaurant at one corner of the property on the other side of a parking lot shared by all the shopping center's occupants.

The Long Beach store is also located in a strip-type shopping center, where it is the most prominent store. The Employer leases the 20,000 square foot single story building. The sidewalk on the two sides of the leased building between the store and the parking area is designated as the "tenant's loading area" under the current lease. The lease specifies that the Employer "shall be permitted, at all times, the exclusive use" of the loading area for deliveries, shopping cart storage, and/or the placement of vending machines, bike racks "and otherwise as necessary or desirable for the smooth and ordinary operation of its business."

The Union has a primary dispute with one of the Employer's suppliers, Voortman. The instant case involves Union handbilling in connection with this dispute at the Rialto, La Puente and Long Beach stores. Thus, on four occasions in early 2004, the Union handed out flyers criticizing the quality of Voortman's cookies, noting its dispute with Voortman and urging consumers not to buy Voortman products.

1. Handbilling at the Rialto Store

On January 14, the Union began leafleting at the Rialto store. A store manager approached the handbillers and asked what they were doing. He looked at one of the flyers and went back into the store. The manager returned about twenty minutes later and said the handbillers had the right to be there as long as they did not block the entrance and did not leave any flyers on the ground.

Three striking Voortman employees returned the next morning to handbill on the sidewalk in front of the Rialto store. After about 15 minutes, they were approached by a different store manager who told them they had to leave. One of the handbillers asked if they could stand in the parking lot. The manager said no because it was private

property. When the handbillers questioned the manager's authority to prohibit their activity, she threatened to call the police and then went back into the store. The handbillers moved away from the store entrance and continued distributing flyers in the parking lot. The manager returned after about twenty minutes and told the handbillers they were on the Employer's private property and repeated the threat to call the police if they did not leave. At that point, one of the handbillers placed a cell phone call to Union representative Anderson, who spoke to the manager. She returned to the store and did not call the police. The handbillers left shortly thereafter.

Later that afternoon, Anderson returned with two other Voortman employees and resumed handbilling. After about 20 minutes, an Employer security guard approached Anderson and the two employees and told them they were not supposed to be there. Anderson told the guard that they had the constitutional right to be on the property. The guard left and returned a short time later with another store manager who said she objected to the content of the flyers and was going to call the police and have them arrested. About 20 minutes later, two police officers arrived. After reading a copy of the flyer and speaking with Anderson, the security guard and the store manager, the police officers told the store manager that the handbillers had the right to distribute the flyers as long as they did not create a disturbance.

2. Handbilling at the La Puente Store

On January 24, two striking Voortman employees began handbilling at the curb near the main entrance to the La Puente store. An employee came out of the store and told them they had to move. The handbillers moved to the parking lot, about 12 feet from the store entrance and resumed handbilling. Within minutes, a store manager approached and told the handbillers they were on private property and would have to leave or he would call the police. One of the handbillers told the manager that they had the right to be on the property and handed him a copy of the Pruneyard decision. The manager skimmed the decision and told them to leave or he would call the police. One of the handbillers called Union representative Gonzalez and reported the manager's threat. Gonzalez arrived at the La Puente store a short time later and spoke to the manager, who confirmed that he had threatened the handbillers. The manager insisted that he was going to call the police and Gonzalez insisted that they were going to continue handbilling regardless of the threats. The handbilling resumed and continued without further interruption.

3. Handbilling at the Long Beach Store

On February 19, a Union representative and two Voortman strikers went to the Employer's Long Beach store and began distributing flyers on the sidewalk about ten feet from the main entrance to the store.⁴ After about 15 minutes, a manager approached and told the handbillers they were on private property and had to leave or he would call the police. The Union representative protested that they had the right to handbill and would stay. They continued distributing flyers. About an hour later, a police officer arrived and told the handbillers that the police had received three complaints about their activity and said they had to leave or he would write them up. When the Union representative started to object, the officer said if he said anything else he would be arrested. The three handbillers left immediately.

ACTION

We conclude that a Section 8(a)(1) complaint should issue, absent settlement, alleging that the Employer unlawfully threatened the Union handbillers with arrest at each of the three stores where handbilling occurred. Despite its ownership and/or exclusive control of each location and the modest, non-public nature of the premises, the Employer could not exclude the handbillers, because the Board looks to the California courts' application of the Moscone Act, which privileges all peaceful labor conduct on private exterior premises, to determine Union access rights in California. [*FOIA Exemption 5, Casehandling*

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Under *Lechmere v. NLRB*,⁵ an employer may generally exclude from its private property nonemployee union representatives engaging in Section 7 activity, provided the employer has a sufficient property interest under applicable state law to exclude others and make a refusal to vacate the property a "trespass."⁶ California state law

⁴ All of the handbilling at the Long Beach store occurred within the exclusive loading area designated in the Employer's lease.

⁵ 502 U.S. 527, 537 (1992).

⁶ *Bristol Farms*, 311 NLRB 437, 438-439 (1993); *Johnson & Hardin Co.*, 305 NLRB 690, 690 (1991), enfd. in pertinent part 49 F.3d 237 (6th Cir. 1995).

establishes certain exceptions to rights of private property owners to exclude alleged trespassory Union conduct from their premises.⁷ In analyzing cases involving access to private property in California, we have historically considered two different lines of California law that limit property owners' rights to exclude individuals engaged in peaceful expressive activity related to a labor dispute. First, California courts have concluded that where a site, such as a large shopping center, assumes the character of a "traditional public forum" or town center, the free speech provisions of the California constitution require the property owner to permit access for peaceful expressive activities.⁸ In a second line of cases, California courts have relied on the Moscone Act⁹ to hold that property owners are not entitled to deny access to individuals engaged in peaceful expressive activity concerning a labor dispute on exterior premises.¹⁰

⁷ Glendale Associates, Ltd., 335 NLRB 27, 28 (2001); Bristol Farms, 311 NLRB at 438-439.

⁸ Robins v. Pruneyard Shopping Center, 153 Cal.Rptr. 854, 860-861 & n. 5 (Cal. 1979), affd. 447 U.S. 74 (1980) (privately owned shopping center offering amenities to attract large numbers of people assumed the character of a town center, or public forum, where speech and petition rights traditionally exercised); NLRB v. Calkins, 187 F.3d 1080, 1090 (9th Cir. 1999) (California courts afford "broad protections to the peaceful exercise of free speech rights over property owners' exclusive control of their property").

⁹ Cal.Civ.Proc.Code §527.3 ("[t]he acts enumerated in this subdivision . . . shall be legal, and no court [shall issue any order] which . . . prohibits . . . (1) [g]iving publicity to, and obtaining or communicating information regarding the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace [and] (2) [p]eaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers").

¹⁰ Sears Roebuck & Co. v. San Diego District Council of Carpenters, 158 Cal.Rptr. 370, 374 (1979), cert. denied 447 U.S. 935 (1980) (Moscone Act's language "leaves no doubt but that the Legislature intended to insulate from the court's injunctive power all union activity . . . [declared lawful under prior California law]"). See also In re Lane, 79 Cal.Rptr. 729, 731-732 (1969) (allowing businesses to

Applying these principles to the three stores at issue here, we initially conclude that neither the Employer-owned Rialto and La Puente stores nor the leased Long Beach store is the equivalent of a Pruneyard public forum. Thus, in contrast to the broad invitation to congregate and array of amenities available in such a forum, the Employer invites members of the public to its stores for the sole purpose of purchasing discounted merchandise.¹¹ Since none of the stores has the public character of a Pruneyard-type forum, the Employer's property interests would appear to outweigh the Union's interest in using the property to publicize its dispute with Voortman.

There is, however, an arguable violation here under extant Board law, based on the rights of access set out in the Moscone Act and interpreted in Sears.¹² In Winco Foods, Inc., the Board held that a stand-alone grocery store had no right under California labor law to exclude union organizers engaged in consumer handbilling from the parking lot and walkways adjacent to its store.¹³ The Board specifically agreed with the judge that "California cases arising in the context of . . . political expressive

declare sidewalks and parking lots surrounding their premises off limits to union activity would encourage others to erect similar "[c]ordon[s] sanitaire[s]" to immunize themselves against criticism and have serious adverse impact on free speech).

¹¹ See, e.g., Trader Joe's Company v. Progressive Campaigns, Inc., 86 Cal.Rptr.2d 442, 433 (1 Dist. 1999) (specialty grocer's invitation to the public more limited than the invitation of a Pruneyard-type forum to "meet friends, to eat, to rest or to be entertained"); Costco Companies, Inc. v. Gallant, 117 Cal.Rptr.2d 344, 355 (4 Dist. 2002) (stand alone "big box" discount store neither a "miniature downtown" nor an "essential or invaluable forum for the general exercise of free speech").

¹² See, e.g., Winco, Inc., 337 NLRB 289 (2001), enf. denied sub. nom Walmart Foods v. NLRB, 354 F.2d 870 (D.C. Cir. 2003) (reh. en banc denied) (stand-alone grocery store precluded from excluding union representatives from exterior premises under Moscone/Sears). See also Indio Grocery, 323 NLRB 1138 (1997), enfd. sub nom, NLRB v. Calkins, 187 F.3d 1080 (9th Cir. 1999) (employer could not bar peaceful handbilling from exterior premises of stand-alone grocery store under both Pruneyard and Sears).

¹³ 337 NLRB at 292-294.

activities have little if any relevance to cases arising in the context of labor-based expressive activities,"¹⁴ and rejected employer contentions that the Moscone/Sears limitation on property rights was preempted or invalid on Fourteenth Amendment equal protection and Fifth Amendment taking grounds. 337 NLRB at 289, 289 n. 3. Based upon this precedent, the Region should issue complaint, absent settlement, alleging that the Employer violated the Act by threatening to call and/or calling the police to eject Union handbillers from its Rialto, LaPuente and Long Beach stores.

[FOIA Exemption 5, Casehandling]

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[Pages 8 and 9, and footnotes 15 - 23 deleted pursuant to FOIA Exemption 5, Casehandling]

B.J.K.

¹⁴ 337 NLRB at 289, n. 1, citing Golden Gateway Center v. Golden Gateway Tenants Assn., 111 Cal.Rptr.2d 336 (2001); Young v. Raley's, Inc., 107 Cal.Rptr.2d 172 (3 Dist. 2001) and Walmart v. Progressive Campaigns, Inc., 102 Cal.Rptr.2d 392 (3 Dist. 2000).